THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0028 OF 2013

1. SHEIKH ABDULAI RAJAB	**}**	
2. AYUME MOHAMMED SAKARI	**}**	
3. SHEIKH SWAIB AHMED	**}**	
4. THE CHAIRMAN MANAGEMENT COMMITTEE OF KAUTHAR MOSQUE, KOBOKO	**}**	**……..……. PLAINTIFFS**

VERSUS

1. SHEIKH ABUBAKAR SONGA WAILOJO	**}**	
2. SOMA SAIDI	**}**	**……..... DEFENDANTS**
3. UGANDA MUSLIM SUPREME COUNCIL	**}**	

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiffs sued the defendants jointly and severally for recovery of general damages for libel, unlawful dismissal, a permanent injunction against interference wit their freedom of worship, the costs of the suit and interest on the monetary awards. The plaintiffs held various positions of religious leadership at Kauthar Mosque, in Koboko Town Council. On or about 1st August 2013, the second defendant is alleged to have written a defamatory letter of and concerning the first three plaintiffs, containing a number of accusations including; preaching false doctrine, spreading propaganda, impersonation, rumour mongering, and collecting "Umah" for personal gain. They were therefore directed to stop conducting prayers for the Umah at the mosque or at any other public gathering.

The plaintiffs contend that in their natural and ordinary meaning, the words complained of meant they are corrupt and have embezzled funds belonging to the Muslim community, both of which are criminal offences. As a result they have been exposed to public ridicule and odium and

shunned by right thinking members of society. By the same letter, the first plaintiff was dismissed from his position as County Sheikh, the second plaintiff from his position as Councillor and the third plaintiff from his position as member of the Council of Sheikhs, all in Koboko Muslim District. They contend that all those dismissals by the second defendant are unlawful. They contend further that the first and second defendants have interfered with their freedom of worship by seeking to impose upon them a different religious doctrine, not of their choice. The acts complained of were committed by the first and second defendants in the course of their employment and duty as agents and servants of the third defendant.

Although they were respectively served with summons to file a defence together with the plaint attached, none of the defendants filed a written statement of defence. On basis of the return of service filed in court on 24th February 2014, and the court being satisfied that service upon each of the defendants was effective, entered an interlocutory judgment against the first and second defendants jointly and severally on 27th May 2014 and the third defendant on 10th October 2014. The suit was then set down for formal proof.

In his testimony, the first plaintiff stated that he was appointed County Sheikh in charge of Koboko Town Council and Madiya Sub-county of Koboko District in the year 2004, by the then Arua District Khadi, Ahmed Amin Maga. The first defendant, in his capacity as the District Sheikh / Khadi of Koboko Muslim District wrote a letter dated 1st August 2013 dismissing him from that position. The first plaintiff received the letter on 15th August 2013, which was delivered to him by the Secretary of Koboko Muslim District Council. The letter contained allegations that he was engaged in rumour mongering, mobilising resources for Umah Muslim believers for personal gain, and so on. The false allegation injured his reputation among the Muslim believers. The second defendant is a member of the Koboko Muslim District Council at which the decision to dismiss him was taken. The first plaintiff was never invited to that meeting to present his defence. Koboko Muslim District Council is a member of the third defendant and answerable to it. The resources he mobilised from the Muslim community were for supporting the needy in the community. The first defendant's teaching is influenced by the Tabliq sect whereas the first plaintiff preaches according to the Sunni sect, hence the friction. He went as far

as asking the police to stop the first plaintiff from preaching. He distributed copies of the letter to different public offices as a result of which the first plaintiff's reputation has been injured.

P.W.2. Ayume Mohammed Sakari, the second plaintiff testified that he was the Imam of Kauthar Mosque in Koboko Town Council, since 1996. On 16th August 2013, he received a letter from the second defendant dated 1st August 2013, dismissing him from service. The letter was copied to fifteen other people. During the year 2013 he was elected as a District Councillor at the Koboko Muslim District Council, and this letter stopped him from engaging in those activities. He was not heard before termination of his role. He was disparaged by the letter since it contained allegations that he was collecting money from Muslims and spending it on his personal needs. He was stopped from preaching. Despite this, the people urged him to continue preaching. The second defendant had no authority to terminate his services since that power vests in the District Khadhi.

P.W.3. Sheikh Swaib Ahmed, the third plaintiff testified that he has been the Imam of Mosque Swabirina at Angufiru in Koboko District since the year 2002. His complaint is in respect of defamatory words contained in a letter dated 1st August 2013 written by the second defendant, which he received on 14th August 2013. The letter purported to stop him from discharging his religious duties as an Imam, and member of the Sheikhs in the District Khadi's Office. He was not given a chance to explain before the letter was written. The allegations made against him in the letter were that he was illegally collecting money from people for his personal use, he engages in false teaching, rumour mongering and impersonation, all of which allegations were false. Copies of the letter were distributed to different persons and offices in Koboko and Kampala.

P.W.4. Afema Mohammed Jaberi, the Chairman of Kauthar Mosque in Koboko, testified that in August 2013, he received a copy of the letter of dismissal addressed to his Imam, the second plaintiff. The first and second defendants subsequently attempted to forcefully take over the mosque. They made false accusations against him at the police. The Muslim faithful were displeased with the letter addressed to the second plaintiff. The contents of the letter were untrue.

The teaching of the second plaintiff was consistent with the Holy Quran. The letters caused the plaintiffs to lose their jobs and reputation as religious leaders.

In his final written submissions, counsel for the plaintiffs Mr. Paul Manzi argued that upon entry of default judgments against each of the defendants, the question of liability ceases to be an issue and all that remains is the assessment of damages. He cited *Haji Asunman Mutekanga v. Equator Growers (U) Limited, S.C. Civil Appeal No. 7 of 1995, [1996] III KALAR 70*, for that proposition. The words complained of were defamatory of each of the plaintiffs. Since they imputed commission of criminal offences of corruption, obtaining money by false pretence and embezzlement, damage is presumed by law. Nevertheless, the plaintiffs have proved that as a result of those letters, they were shunned by right thinking members of society who take them to be thieves and fraudsters. They were as well dismissed from their religious positions and restrained from performing their religious work and activities, in violation of their constitutional rights to a fair hearing before nay administrative decision is made. They were never given a hearing before the dismissals. He prayed that judgment be entered in their favour and te reliefs sought in the plaint be granted. He proposed an award of shs. 80,000,000/= as general damages for libel to each of the plaintiffs and shs. 20,000,000/= to each as damages for violation of their constitutional rights.

When the default judgment was entered against the defendants, the court inadvertently did not specify the order and rule under which the judgment was entered. That notwithstanding, being a claim for un-liquidated pecuniary damages, interlocutory judgment against the defendants is deemed to have been entered under the provisions of Order 9 rule 8 of *The Civil Procedure Rules* whereupon the suit was set down for assessment by the court of damages only. That provision was designed to prevent delay in the administration of justice. Where a default judgment has been entered, the defendant loses the right to cross-examine any witness called on behalf of the claimant or to make submissions to the court in respect of liability except as to the incidence and quantum of damages. However, if the defendants wished to participate fully, they had to seek the judgment to be set aside. Since none of the defendants made such application, the burden lay on the plaintiff to prove the damages, without the possibility of subjecting the evidence they adduced, to any cross-examination.

Despite the absence of cross-examination, it was held in *Kirugi and another v. Kabiya and three others [1987] KLR 347*, that:

> The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.

In *Daniel Toroitich Arap Moi and another v. Mwangi Stephen Murithi and another [2014] eKLR* the Court of Appeal of Kenya held that:

> Submissions cannot take the place of evidence…..Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.

On the other hand, *Black's Law Dictionary*, 8th Edition defines a pleading as: **"**a formal document in which a party to a legal proceeding especially a civil law suit sets forth or responds to allegations, claims denials or defences." It therefore follows, that a pleading is not evidence. Further, Section 2 of *The Evidence Act* defines evidence as: "the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity." For example, in *CMC Aviation Limited v. Cruise Air Ltd (1) [1978] KLR 103*, where the plaintiff merely asserted that since the first defendant did not file any defence or controvert the pleadings or rebut the statement that the plaintiff was lawfully crossing Ngong Road when the first defendant violently knocked him, then he needed not prove how the accident happened and hence the liability of the first defendant. Madan JA observed that pleadings contain the averments of the three concerned until they were proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation if evidence.

Therefore, when the court sets down a suit for formal proof, the plaintiff is under a duty to place before the court evidence to sustain the averments in his or her plaint. The pleadings and written submissions are not evidence. Thus even where there is no rebuttal because of the defendants' failure to file a written statement of defence, hence in a matter that requires formal proof,

sections 101 – 104 and 106 of *The Evidence Act* apply. The plaintiffs being desirous of the court giving judgment as to legal rights or liability dependent on the existence of facts which they assert, must prove that those facts exist. They had to prove how the libel occurred and hence the contribution of each of the defendants to the damage occasioned to them by the libel. Although due to the defendants' failure to file written statements of defence it was not necessary for the plaintiffs in the instant suit to prove that they had suffered damage as a result of the libel, it was necessary for them to prove that the libel attributable to each of the defendants caused the particular damages claimed. The causal link must be established by evidence.

The scope of this obligation is illustrated by the decision in *Lunnun v Singh [1999] CPLR 587; (1999) The Times, 19 July*. In that case, the defendants were the trustees of a Sikh temple. The claimant owned an adjacent property in which the cellar was being flooded. The claimant issued proceedings against the defendants, claiming water was flowing from a cracked sewer on their premises and was causing the flood. Judgment in default was entered on 27th June 1991. No application was made to set aside the judgment. However, in 1998 a schedule of damages was served for the costs of repairing the cellar. The costs amounted to £33,140. The court held that it was not open to the defendants to argue the plaintiff had not suffered damage as a result of water flowing from a cracked sewer on its premises. However, it was open to the defendants to dispute that the water flowing from their property was the cause of any particular head of damages. It was also held that the fact that a judgment had been entered on the issue of liability did not reverse the burden of proof. The burden was still on the plaintiff, in relation to each individual head of loss, to prove causation and quantum. It was the defendants' case that any damage caused by the cracked pipe was minimal, and the plaintiff was only entitled to nominal damages.

Clarke LJ on Appeal set out the principles that apply when there is a default judgment with no judicial determination of the issue of liability, thus; (a) on the assessment of the damages, the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim (b) however, subject to this, the defendant may take any point which is inconsistent with the liability alleged in the statement of claim. Such points include: (i) Contributory negligence; (ii) failure to take reasonable steps to mitigate; (iii) causation (while the defendant cannot contend that his acts or omissions were not causative of any loss to the plaintiff, he can still argue, on the assessment, that they were not causative of any particular items of alleged loss);

and (ii) quantum. The interlocutory judgment did not resolve the issue as to what damage the water had caused. The claimant had to prove this.

Similarly in the instant case, the interlocutory judgment did not resolve the issue as to the causal link between the acts of the defendants and the damage caused by the libel. The plaintiffs had to prove this. The underlying principle is that on an assessment of damages, all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment. The Court is under a duty to consider whether the claim both in respect of damages and causation is on its face made out, and if it is, will give judgment.

In their joint plaint, the plaintiffs attribute the damage suffered, directly to the first and second defendants as authors of the impugned libellous letter and vicariously to the third defendant based on the averment that in publishing the letter, the first and second plaintiffs acted as agents of the third defendant as its employees and servants. For purposes of attributing the damage suffered to the third defendant, the plaintiffs had the burden of proving the agency relationship between the first and second defendants on the one hand with the third defendant on the other. It is the existence of master and servant relationship which gives rise to vicarious liability (See *Dritoo v. West Nile District Administration [1968] EA 428*).

*In Morgan v. Launchbury and Others [1972] 2 All ER 606***,** it was stated that in order to establish an agency relationship between the owner of a car and the driver who caused an accident while driving the car, it was necessary to show that the driver was using the car at the owner's request, express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. The court stated;

> In order to fix liability on the owner of a car for negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his. Instructions and was doing so in performance of the task or duty thereby delegated to him by the owner**.**

In the instant case, the plaintiffs had to lead evidence showing that at the time of publishing the letter complained of, there existed a master and servant relationship between the third defendant on one side and the first and second defendants on the other. Such relationship required evidence of the latter being employees of the former or that the publication was done at the request, express or implied or its instruction and that they did so in the performance of a task or duty thereby delegated to them by the third defendant.

The evidence adduced by the plaintiffs is constituted only by assertions that the first defendant, was at the material time the District Sheikh / Khadi of Koboko Muslim District but it was not explained in what capacity the second defendant acted. It is in the capacity of District Sheikh / Khadi of Koboko Muslim District that the first defendant wrote a letter dated 1st August 2013 dismissing the first plaintiff from his position as County Sheikh in charge of Koboko Town Council and Madiya Sub-county of Koboko District. A similarly worded letter dated 1st August 2013 was signed by the second defendant dismissing the second and third plaintiffs from the position of Imam of Kauthar Mosque in Koboko Town Council and District Councillor at the Koboko Muslim District Council, and the Imam of Mosque Swabirina at Angufiru in Koboko District, respectively. Both defendants signed as "District Khadi- Koboko Muslim District." The first plaintiff received the letter on 15th August 2013, the second plaintiff on 16th August 2013 and the third plaintiff on 14th August 2013. The letter itself is signed by the first defendant. Apart from citing the Constitution of the third defendant in that letter, there is no evidence regarding the relationship that existed between the third defendant and the first defendant. It is not clear whether the first defendant was appointed by the third defendant or is employed by the third defendant. The relationship between the third defendant and the office of District Sheikh / Khadi of Koboko Muslim District is as well not explained. There was no evidence adduced by any of the plaintiffs that the publication of the letters complained of was done at the request, express or implied or upon the instructions of the third defendant. There being no evidence that they did so in the performance of a task or duty assigned or delegated to them by the third defendant, the plaintiffs failed in discharging the onus of attributing their damage to the third defendant.

Similarly, the plaintiffs did not furnish any evidence of a contract of service with the third defendant. There is no evidence of the terms of employment and any earnings due to the

plaintiffs under such contract. The claim for damages for unlawful dismissal was therefore not proved and is accordingly dismissed. I as well do not find any justification for issuing the injunction sought in the plaint.

The only evidence adduced by the plaintiffs attributes authorship and dissemination of the letters complained of to the first and second defendants. It is only against the two of them that causation has been attributed. Therefore it is only against them that damages are recoverable. The causal link requiring damages to be awarded against the third defendant has not been proved as and for that reason none will be awarded against the third defendant. For that reason the interlocutory judgment against the third defendant is hereby set aside.

General damages are such as the law will presume to be the natural and probable consequences of the defendant's words or conduct. They arise by inference of law and need not, therefore be proved by evidence. If words have been proved to be defamatory of the plaintiff, general damages will always be presumed. Imputation of commission of a criminal offence is actionable per se without any need of proving damage on the part of the plaintiff (See *Blaize Babigumira v Hanns Besigye HCCS No. 744 of 1992*).

The principle governing the award of damages was outlined in *John v MGN Ltd [1996] 2 ALL ER 35 at 47* where the Court of Appeal of England stated as follows:

> The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate for the damage to his reputation; indicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication caused.

A person’s reputation has no actual value, and the sum of be awarded in damages is therefore at large and the Court is free to form its own estimate of the harm taking into account all the circumstances (see *Khasakhala v Aurali and Others [1995-98]1 E.A. 112*). General damages are to be determined and quantified, depending upon various factors and circumstances. Those factors are (i) the gravity of allegation, (ii) the size and influence of the circulation, (iii) the effect

of publication, (iv) the extent and nature of claimant's reputation and (v) the behaviour of defendant and plaintiff.

In *Kanabi v Chief Editor Ngabo Newspaper and others*, the Supreme Court commented as follows;-

> It is not enough to consider the social status of the defamed person alone in assessing award of damages. It is necessary to combine the status with the gravity of or the seriousness of the allegations made against the Plaintiff. Anyone who falsely accuses another of a heinous crime should be condemned heavily on damages. Once an ordinary person is defamed seriously and is shunned by the public then it does not matter whether he or she is of high or low status.

In *David Kachontori Bashakara v Kirunda Mubarak, H.C.C.S No. 62 of 2009,* general damages of Shs.45,000,000/= were awarded to a plaintiff who had been a public servant for a period of 33 years and had during the course of his service been to various parts of Uganda. He had a family of seven mature children and lots of friends in many parts of the country who were saddened and scandalized by the utterances complained of made in Lusoga, imputing a criminal offence (the words were "corrupt, thief, embezzler, unfit to hold public office") and broadcast in many parts of the country where the language is understood. He had as a result lost the Mayoral race in Mbarara.

In *Joseph Kimbowa Lutaaya v Francis Tumuheirwe H.C. Civil Suit No.862 of 2001*, general damages of shs 10,000,000/= were awarded to a plaintiff, a manager with Allied Bank, in respect of a defamatory memo written by the defendant to the Permanent Secretary to the Treasury explaining the reasons why the plaintiff's wife had been suspended. In that memo the defendant alleged inter alia that the plaintiff while still working with the Standard Chartered Bank connived with his wife to steal shs.50,000,000/= (fifty million) and was as a result was dismissed from the Bank while his wife was dismissed from USAID. In that case the publication was made only once and there was no repetition. The publication did not capture a wide publicity.

In *Abu Bakr K. Mayanja v Tedi Seezi Cheeye and another, H.C. Civil Suit No. 261 OF 1992*, the plaintiff who by then a Minister of Justice and Constitutional Affairs and Attorney General, was awarded a sum of shs 2,000,000/= in general damages for libel for an article published by the

defendants alleging that he was a confused “third deputy Prime Minister.” The court observed that a plaintiff who puts himself in public life must expect public scrutiny of his conduct as a public figure. The established principle though is that the higher the Plaintiff's social status, the greater is the likely injury to his feelings by a defamatory publication about him and therefore the greater is the amount of damages awardable. The amount is enhanced where the publication is extensive and where the defendant acted maliciously in the publication. In that case, it was found that the circulation of the Newspaper was limited to Kampala, Jinja and few main towns in Western Uganda.

In the instant case, I have considered the gravity of the allegations. The plaintiffs were accused of the criminal offences of embezzlement and obtaining money by false pretence. They were accused of false religious teaching and directed to relinquish their positions. Their freedom of worship was unjustifiably interfered with or restricted. However, the circulation of the letters does not appear to have exceeded the Local Muslim Community within Koboko District and the leadership of the Uganda Muslim Supreme Council in Kampala. The plaintiffs did not lead any useful evidence relating to the extent and nature of their reputation, except as among the Muslim Community. According to PW4, the letters caused the plaintiffs to lose their jobs and reputation as religious leaders.

On account of all those factors, I am of the view that an award of shs. 6,000,000/= (six million shillings) in general damages would be adequate compensation to each of the plaintiffs. Judgment is therefore hereby entered for the plaintiffs against the first and second defendants jointly and severally in the sum of shs. 6,000,000/= to be paid by the two defendants to each of the plaintiffs. The plaintiffs are as well awarded the costs of the suit.

Dated at Arua this 24th day of January 2017. ……

Stephen Mubiru

Judge